

No. 82-1322

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In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA AND
ROSCOE L. EGGER, JR., COMMISSIONER OF
INTERNAL REVENUE, *Petitioners*

v.

WILLAMETTE INDUSTRIES, INC., *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals for the Ninth Circuit was correct in affirming a district court ruling that neither the Freedom of Information Act (5 U.S.C. §552) nor §6103 of the Internal Revenue Code (26 U.S.C. §6103) prohibits the disclosure of Internal Revenue Service timber valuation documents, where the documents have been determined by those courts to constitute compilations of data that pose no risk of identification of any taxpayers.

PARTIES TO THE PROCEEDINGS

The subsidiaries and affiliates of respondent Willamette Industries, Inc., are: Freres Veneer Company; Santiam Southern Company; Taylor Development Company, Inc.; W. I., Inc.; and Wimer Logging Co.

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STATEMENT OF THE CASE

This case involves a Freedom of Information Act request submitted to the Internal Revenue Service in which the respondent requested disclosure of two types of documents. The first type of documents consisted of timber valuation reports prepared by the Internal Revenue Service in income, estate and gift tax cases. The second type of documents consisted of data relating to timber sale transactions.

Respondent is a publicly held producer of wood and paper products that, like all other large corporations, is subject to annual audit by the Internal Revenue Service. A perennial issue is the fair market value of timber cut by respondent which qualifies for capital gain treatment under Section 631(a) of the Internal Revenue Code (26 U.S.C. §631(a)). In recent years, the volume of timber valuation and other valuation cases in the federal courts has risen dramatically, partly due to unreasonable bargaining positions taken by one or both parties in hopes that the courts will "split the difference" between the taxpayer position and the position of the Internal Revenue Service, e.g., *Willamette Industries, Inc., et al. v. Commissioner*, 1980 Tax Court Memorandum Decision No. 577; *Buffalo Tool and Die Manufacturing Co., Inc., v. Commissioner*, 74 T.C. 441, 451-452 (1980).

By gaining access to valuation opinions issued by the Internal Revenue Service ("IRS") in other cases, and in being able to review timber sales data used by the IRS as comparable sales in formulating those opinions, the respondent is hoping to remove the cloud of secrecy that now surrounds IRS valuation procedures. It is generally agreed that "fair market value" of timber (or any other asset) should be the same for income, estate and gift tax purposes. By having access to the requested data, the respondent hopes to determine if the IRS valuations are being made scientifically and applied uniformly and consistently, or whether those decisions are based on

guesswork or bias and then inconsistently applied. The ultimate goal is to reduce the volume of tax litigation through the application of consistent valuation techniques.

The initial Freedom of Information Act ("FOIA") request was denied administratively, and this suit was brought. In the district court, the IRS attempted to show that the 1976 Haskell Amendment (26 U.S.C. §6103(b)(2)) did not apply to the requested documents and that the documents posed a risk of identifying other taxpayers. Based on testimony and an affidavit of an Internal Revenue Service forester, depositions of three IRS foresters, and sample documents submitted by the IRS, the district court held that the documents should be disclosed to the respondent after removal of taxpayer names and timber volumes. In so doing, the district court found as a fact that the documents did constitute "data" within the purview of the Haskell Amendment, and further found as a fact that the government had failed to meet its burden of proof that the edited documents might indirectly identify taxpayers (Pet. App. 22a and 24a).

The government appealed. The Court of Appeals for the Ninth Circuit, after making its own review of the sample documents (Pet. App. 7a), affirmed the district court's ruling. The Ninth Circuit specifically held that the information "is in effect compilations of data" (Pet App. 9a) and that the risk of indirect identification was unproven or nonexistent (Pet. App. 6a-7a).

SUMMARY OF ARGUMENT

The petition for writ of certiorari should be denied because no conflict exists between the decision below and the decision of the Seventh Circuit in *King v. Internal Revenue Service*, 688 F.2d 438 (1982).

The requested documents in the *King* case were so narrowly defined as to limit the documents to those pertaining to one particular taxpayer. As a result, taxpayer identification was certain. In the present case, the documents pertain to an entire industry, and both the district court and the court of appeals found that the government failed to demonstrate any risk of taxpayer identification.

Both of the lower courts in the present case also determined that the requested documents constituted "data" as that term is used in the Haskell Amendment to the Internal Revenue Code, 26 U.S.C. §6103 (b) (2), and also found that the documents constituted "compilations of data" as that phrase is used in the legislative history of the Haskell Amendment.

Since the *King* decision involved documents that posed a clear risk of taxpayer identification, and did not involve "data" or "compilations of data", we submit that the decision below is not in conflict with *King*. In the present case, the government failed to show a risk of identification, failed to show that the documents did not consist of data, and is now asking the Supreme Court to review the purely factual findings of the courts below.

ARGUMENT

The government has attempted to demonstrate a conflict between the decision below and the recent decision of the Court of Appeals for the Seventh Circuit in *King v. Internal Revenue Service*, 688 F.2d 488 (1982). In fact, no such conflict exists. Although the government contends (Pet. 7) that the documents in *King* are "virtually identical" to the documents at issue here, the two sets of documents have no similarities whatsoever.

The documents in *King* consisted of eight specific documents, all of which apparently pertained to one particular taxpayer. Described in the *King* request were correspondence and IRS audit documents pertaining to that particular taxpayer, including photographs of utility trucks owned by the taxpayer (688 F.2d at 491). The Seventh Circuit, relying in part on the obvious risk of identification of the taxpayer, ruled that the FOIA did not require disclosure.

In contrast, the decision below involved compilations of timber sales data and timber value determinations on an industry-wide basis. Unlike the documents in *King*, the scope of documents requested in the present case was not so limited as to be deliberately restricted to one specific taxpayer.

The government argues (Pet. 12) that the decision below would enable a party to prepare a FOIA request that was so carefully narrowed that particular taxpayers would be directly or indirectly identified.

The government's argument is simply incorrect. In the present case, both the district court and the Ninth Circuit specifically examined the potential risk of identification and found that the government failed to demonstrate the presence of any such risk. If future requests are presented, similar inquiries will be made, and narrow requests that pose identification risks will be rejected, as the Seventh Circuit opinion in *King* demonstrates.

The government also argues (Pet. 12) that neither a court nor the Internal Revenue Service is in a position to appraise whether a party making a FOIA request could use the requested material to identify other taxpayers. As the Ninth Circuit observed in the present case, that argument "is too speculative and not supported by facts." (Pet. App. 7a). In addition, that argument is contradictory, since it would leave to the IRS the sole responsibility for making that decision which the government contends the IRS is not capable of making. Moreover, the argument contradicts the statutory provision that the agency must bear the burden of proving that particular documents are exempt from the broad reach of the FOIA. 5 U.S.C. §552(a)(4)(B); *Ollestad v. Kelly*, 573 F.2d 1109, 1110 (9th Cir., 1978).

The government's discussion of the issue of indirect identification also misstates the facts of this case. Contrary to the government's phrasing of the question presented, and contrary to a statement made on page 7 of the petition, the district court held, and

the Ninth Circuit affirmed, that the government failed to carry its burden of proof as to whether the requested documents presented a risk of identifying any particular taxpayers. The district court held that, despite broad assertions regarding the danger of indirect identification, "no detailed explanation was given to support such opinion. Such testimony does not meet the burden of proof on this issue." (Pet. App. 25a). The Ninth Circuit affirmed this finding when it stated that "no specific evidence was given as to how often this danger of indirect identification might exist." (Pet. App. 6a). The court of appeals then went so far as to review the sample documents itself, and stated "Our review of the private sales data compilations shows that there is little danger of such indirect identification from the edited form." (Pet. App. 7a).

Despite these findings by the lower courts, the government's petition describes the risk of identification as if it were an established fact. Unlike the clear risk of identification present in *King*, the documents requested here present no such risk. In effect, the government is not asking this Court to review conflicting legal positions adopted by two circuits, but instead is asking this Court to supervise the fact-finding role of the federal district court, a duty that has already been performed in this case by the Court of Appeals for the Ninth Circuit.

On this purely factual issue of risk of identification, this case presents a situation in which the gov-

ernment simply failed to carry its burden of proof in the trial court.

The government's petition also misconstrues the legal issues involved in the present case, in *King*, and in *Long v. Internal Revenue Service*, 596 F.2d 362 (9th Cir., 1979), cert. denied, 446 U.S. 917 (1980). In its attempt to emphasize an alleged conflict between the Seventh and Ninth Circuits, the government first argues that the *King* decision restricts the application of the Haskell Amendment to statistical studies and compilations of data. The government then argues that the decisions of the Ninth Circuit in the present case and in *Long* permit the disclosure of *any* document as long as identifying material is deleted. An examination of the opinions in this case and in *Long* shows that the government's alleged conflict does not exist.

The *Long* case dealt with information gathered in the IRS Taxpayer Compliance Measurement Program ("TCMP"), which the *Long* court described as "a continuing series of statistical studies" (596 F.2d at 364). In addition to authorizing the release of the TCMP statistical studies, the Ninth Circuit ruled that the source data for the studies should also be released. Thus the court merely approved the release of statistical studies and compilations of source data. The court did not approve the indiscriminate release of return information, nor did it express the view that *any* information could be released if properly edited.

The documents involved in the present case are

similar to the documents involved in *Long*. In the present case, the district court reviewed the sample exhibits and concluded that "the material sought here is more in the nature of data or statistics" (Pet. App. 21a) as opposed to individual memoranda and other interpretive material such as that involved in *Cliff v. Internal Revenue Service*, 496 F. Supp. 568 (S.D.N.Y., 1980). The Ninth Circuit did not simply rely on that conclusion of the trial court here, but made its own inspection of the sample documents (Pet. App. 7a) and concluded that "the information involved in this case is in effect compilations of data" (Pet. App. 9a).

This factual finding by the district court and by the Ninth Circuit contradicts any allegations by the government that the present case is in conflict with the *King* decision, since a finding that the documents are compilations of data brings the documents within the interpretation of the Haskell amendment urged by the government in this case and approved by the Seventh Circuit in *King*. In other words, if presented with the facts in the present case, the *King* court would have reached the same result that the government is now asking this Court to review.

CONCLUSION

Since no conflict exists between the circuits, and since the petition presents no other "special and important reasons" (Rule 17.1) for granting the petition, the petition should be denied.

Respectfully submitted,

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